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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 180

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner*,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., and the NEW YORK CENTRAL RAILROAD COMPANY, *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

In an earlier decision the court below held that work rules established pursuant to Arbitration Award No. 282 continued to apply, after the expiration of that Award, until changed in accordance with the Railway Labor Act. This Court denied a petition by the present petitioner for a writ of certiorari to review that decision. In the present case petitioner sought to raise that issue for a second time and the court below adhered to its prior decision. Petitioner is again asking this Court to review the question of whether work rules established pursuant to Award 282 continue to apply, after expiration of the Award, until changed in accordance with the Railway Labor Act.

Statement of the Case

For at least 70 years if not longer, firemen generally have not been hired to work on a particular crew, or on a particular locomotive, or at a particular location. Their assignment at any particular time is dependent upon the workings of a seniority system, pursuant to collective bargaining agreements, whereby the jobs made available to firemen within a seniority district are subject to the exercise of seniority with the most senior man having preference in the event that two or more firemen seek the same assignment. Hence, transfers from one assignment to another, both of a forced and a voluntary nature, have long been characteristic of a fireman's employment, and such transfers have often been necessary even though the new assignment may be regarded by the particular fireman as less advantageous than his existing assignment in terms of earnings, location, days or hours of work, or other factors. The work rules established by the Award of Arbitration Board No. 282 did not alter this seniority system, but did authorize respondents to reduce the number of fireman assignments made available for the exercise of seniority. The "hardships" of which petitioner complains, to the extent that they exist at all, are a normal consequence of the exercise of seniority among assignments made available by respondents and of the reduction in the number of assignments pursuant to the work rules as modified by Award 282.[1] JA 98-99, 104,

[1] Many of the allegations in petitioner's affidavits were inaccurate or incomplete. See JA 30-139, 145-153, 157-213, 254-260, 262-276. For example, with respect to the matter referred to in the Van Dover letter quoted in the petition (p. 9, fn. 4) as "illustrative," the carrier's affidavit (JA 105-108) reveals that the transfer of certain firemen from Poplar Bluff to St. Louis was made in response to a complaint by petitioner that more firemen were needed in St. Louis as the existing employees were being required to work overtime excessively, and because the firemen in question were restricted (because of their qualifications) to hostler assignments when available, which assignments were available at St. Louis but not at Poplar Bluff.

110-111, 118-119, 123, 124-125, 131, 135-136, 170-180, 256-257, 271-274.

Although the replacement of steam-powered locomotives by diesels deprived firemen of their primary function and rendered them unnecessary to the safe and efficient operation of most locomotives, collective bargaining agreements continued to require the use of a fireman on most locomotives. To remedy this wasteful and expensive use of manpower, the railroads in 1959 served proposals pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156) to change those agreements so as to give management discretion insofar as the use of firemen on non-steam-powered freight and yard locomotives was concerned. When the procedures of the Railway Labor Act were exhausted without settling the dispute and a nationwide railroad strike impended, the Congress enacted P.L. 88-108 (77 Stat. 132) whereby the fireman manning issue (and another issue as to the manning of train crews) was submitted to compulsory arbitration.

The Award by Arbitration Board No. 282 (JA 11-18) continued the existing rules concerning the use of firemen in effect except as modified by the Award. In general, the Award modified those rules so as to permit the carriers to abolish up to 90% of all fireman assignments in freight and yard service, subject however to an obligation to continue to make enough assignments available so as to provide an opportunity for employment in engine service to certain firemen (generally those with ten years or more seniority as of the effective date of the Award) who were to be retained in engine service until removed by natural attrition. The carriers determine which of the assignments within the 90% should be abolished and which should be made available so as to provide employment in engine service to the firemen entitled thereto by the Award to the extent that enough assignments in which firemen have to be used are

not available for that purpose. The seniority rules generally were not modified by the Award, and the seniority system continues to operate as before with the exception that fewer assignments are made available to the reduced number of firemen for seniority choice. See JA 19-29, 176-177. The validity of Award 282 was attacked by petitioner and other unions, but was upheld in *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 118 U.S. App. D.C. 100, 331 F.2d 1020 (1964), *cert. denied*, 377 U.S. 918 (1964).

Award 282 expired on March 31, 1966, and an issue arose as to what work rules should govern the use of firemen after that date. The Court of Appeals "approve[d] the conclusion of the District Court that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition [as contended by petitioner] and that the new plateau of work rules, established for early 1966 by the Award, continued in effect unless changed in accordance with the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, 128 U.S. App. D.C. 59, 385 F.2d 581, 587 (1967), *cert. den.*, 390 U.S. 923 (1968). See, generally, 385 F.2d, at 592-594, 608-612.

While the appeal in that case was pending before the Court of Appeals, petitioner brought this ancillary proceeding requesting the District Court to interpret its judgment (see JA 214) and to enjoin the carriers from engaging in various activities allegedly prohibited by that judgment (JA 139-141).[2] Affidavits filed by the parties conflicted as to many details, but petitioner accepted the following statement of facts made by respondents in a brief filed with the District Court (JA 214-215):

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[2] In addition, petitioner filed an independent action against respondent New York Central R. Co. in the United States District Court for the Southern District of Indiana, which was transferred by that Court to the District of Columbia where it was heard and disposed of together with the ancillary proceeding (see JA 232-254, 261, 276-278).

"Thus, while the affidavits allege a bewildering variety of specific facts, many of which are in dispute, the activities complained of for the most part come within the following categories: (1) actions by a carrier in the exercise of its right under its rules as modified by the Award to determine which of the 'blankable' assignments should be made available to C(6) and C(7) firemen in the exercise of their seniority so as to provide them with engine service employment, and which should be discontinued or 'blanked,' as where an assignment was blanked after the incumbent fireman was promoted to engineer or voluntarily transferred to another assignment; and (2) actions by a carrier in the exercise of its right under its rules as modified by the Award to use its firemen in 'must fill' assignments or on extra boards, which protect temporary vacancies in 'must fill' assignments, as where blankable assignments are discontinued or 'blanked' so that some firemen will have to claim such 'must fill' or extra board assignments in the exercise of their seniority in order to obtain engine service employment."[3]

Hence, petitioner conceded that respondents' activities of which it complained were taken "in the exercise of [their] right under [their] rules as modified by the Award" and, as the lower courts pointed out (Pet., App. A, at 30-36, 39),

[3] A "blankable" assignment is one within the 90% that the carriers were authorized by the Award to abolish if not needed to provide engine-service employment to employees entitled thereto by the Award. Such an assignment is said to have been "blanked" when it is in fact abolished because no longer needed for that purpose. A "must fill" assignment is one in which a fireman must be used, such as those within the 10% not subject to being abolished under the Award, passenger and hostler assignments. "C(6) and C(7) firemen" are those entitled by the Award to engine-service employment until removed by natural attrition (or in the case of C(6) firemen, until offered a comparable job). Firemen on an "extra board" fill temporary vacancies in regular assignments, as where the fireman holding the regular assignment is ill or on vacation.

Board 282 has interpreted its Award as authorizing such actions. See, also, JA 19-29. The only issue before the District Court, therefore, was whether respondents could thus continue to apply their rules as modified by the Award after expiration of the Award under that Court's judgment of May 12, 1966. See JA 143. Since that judgment provided (JA 6), among other things, that "the railroads need not use firemen (helpers) on engines (other than steam powered) in freight and yard service except as required by the Award" as "the modifications in [the prior rules] made by . . . the Award and actions taken thereunder created a new status which is to be maintained after the expiration of the Award until changed" in accordance with the Railway Labor Act, the answer obviously was that respondents could do so, as the District Court held in its order of September 20, 1966 (JA 229-230).

In addition to contending before the District Court that its May 12, 1966 judgment should be construed to prohibit the activities complained of in this proceeding, petitioner contended before the Court of Appeals on appeal from that judgment that it should be reversed because, among other things, it permitted such activities. Thus, petitioner referred to the situation involving the New York Central (JA 232-278) as an illustration of its contention that the judgment of the District Court was "unreasonable,"[4] and set forth in full the Shattuck affidavit quoted in the present petition (pp. 9-10) to support a contention that the Court of Appeals, if it rejected petitioner's basic contention that the old rules automatically were restored to full force and effect when Award 282 expired, should hold that firemen must be used "except as to jobs from which firemen actually had been removed during the period of the Award."[5]

[4] Brief, at 35-37.

[5] Reply Brief, at 17-23. In its initial opinion, the Court of Appeals directed the parties "to submit within 10 days a proposed judgment,"

The Court of Appeals in its earlier decision rejected that contention pursuant to its fundamental ruling that the work rules established under Award 282 continued to apply until changed in accordance with the Railway Labor Act. Among other things, that court ruled:

> ". . . [I]f the work rule in effect on the last day of the Award provided that a fireman was not required for a particular engine crew—because the crew was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award. The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an action in accordance with the work rule in force on the critical date, a rule which provided that no fireman was required for that crew."

Brotherhood of Railroad Trainmen v. *Akron & B.B. R. Co.*, *supra*, 385 F.2d, at 611.

In its petition for writ of certiorari requesting this Court to review that earlier decision (No. 859, O.T. 1967), petitioner asserted (p. 22), among other things, that: "Accentuating the importance of that question [presented in

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at which time they could "also request supplemental rulings on any matters that have not been discussed in this opinion." 385 F. 2d, at 605. In responding to that direction, petitioner urged the Court of Appeals to adopt the position thus asserted in petitioner's Reply Brief. Memorandum Concerning Judgment Proposed by the Brotherhood of Locomotive Firemen and Enginemen, at 3. The Court of Appeals rejected that contention, in the paragraph of its supplemental opinion quoted in the text immediately following this footnote.

that petition] is the consideration that this Court's resolution of the central issue herein will be dispositive or controlling in a large volume of pending federal litigation, involving ancillary issues concerning the continuing effect, if any, of the expired Award" (citing in a footnote the instant case [Nos. 20,472, 20,473 and 20,647 in the court below] among others). Petitioner further complained at that time (*id.*, at 16-17) that the District Court in the September 20, 1966 order appealed in this case had "permitted additional reductions" in the number of fireman assignments after expiration of Award 282,[6] and that the Court of Appeals in its prior supplemental opinion similarly "rule[d] that jobs manned during the Award may be left vacant when a fireman leaves that position due to health, retirement, etc., after the expiration of the Award." This Court denied that petition for writ of certiorari as well as petitions directed to other rulings by the Court of Appeals filed by respondents here and by other unions. 390 U.S. 923.

Nevertheless, petitioner continued to press its appeal in this case from the September 20, 1966 order by the District Court, attempting in effect to reargue the very issue that the Court of Appeals had thus decided and as to which this Court had denied certiorari. Petitioner sought to justify that action and distinguish the ruling by the Court of Appeals quoted above, because (Brief, at 28, fn. 10): "We cannot believe that in 1967 this Court could have resolved the present issue before it had properly been briefed or

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[6] "Among those rulings were approval of forced transfer of firemen from more desirable jobs (by vacating jobs manned during the Award) to less desirable jobs at distant places resulting in dollar savings to the railroads; . . . . Judge Holtzoff's adverse rulings in these several respects, entered months after his issuance of the judgment in the underlying actions, were duly appealed by the BLF&E to the court below in . . . Nos. 20,472, 20,473 . . . and . . . No. 20,647. By stipulation of the parties those appeals have been held in abeyance pending the resolution of the underlying issue in this case." Pet. in No. 859, O.T. 1967, at 16, fn. 10.

argued and the BLF&E granted its full day in court upon so vital a question." But, as we have shown, the question had been specifically briefed and argued before the Court of Appeals in the prior case, as well as being implicit in the fundamental issue in that case as to what rules applied following the expiration of Award 282. Thus, that Court held that the September 20, 1966 ruling by the District Court "is correct under the *Akron* decision" (Pet., App. A, at 39), quoting in a footnote to that statement the passage from its prior decision which we have quoted above.

Argument

We think it obvious from our Statement of the Case that the decision below is not one that should be reviewed by this Court on petition for writ of certiorari. As we have there demonstrated, this Court already has denied a petition for writ of certiorari requesting review of an earlier decision of the same issue in an even broader context by the court below. The present decision by the court below merely reiterates and applies one aspect of its earlier decision. Nothing has occurred since the earlier petition was denied to cause this Court to change its mind and grant this petition. Petitioner does not even contend that the decision below conflicts with a decision of some other court, and there is no such conflict. Rather, the decision below accords with the earlier decision of that court (and also of the District Court). And, the issue of law decided has no more general importance now than when it was first decided. Indeed, the earlier decision by the Court of Appeals involved a number of other rulings which respondents here or other unions sought to have reviewed and which added to the overall importance of that decision as compared to the decision now sought to be reviewed. In essence, throughout this proceeding petitioner has tried to obtain a "second bite at the

apple'' by persuading the courts to depart from a prior decision in the guise of interpreting that decision to mean the contrary of what was explicitly said. Both the District Court and the Court of Appeals refused to go along with that gambit, and we submit that they were fully justified in so doing.

Award 282 modified the prior work rules so as to authorize respondents to eliminate the use of firemen on about 90% of the crews in freight and yard service, subject to a requirement that engine-service employment be made available to certain existing firemen until removed by natural attrition. All that respondents have done is to assure that the firemen thus retained are used in assignments which must be filled (as in the 10% ''vetoed'' by the union under the Award), and where there are not enough such assignments to provide engine service to all of the firemen entitled thereto under the Award, to determine which of the assignments within the 90% subject to being abolished are to be made available for that purpose. If this were not allowed, respondents would have to hire a new employee every time a ''must fill'' assignment is vacated to fill that assignment, even though existing firemen were being used in assignments where firemen are not needed.

There is no contention that any fireman entitled thereto under the Award has been deprived of employment in engine service. Petitioner conceded in the District Court that the activities complained of were permitted by respondents' ''rules as modified by the Award,'' and thus were lawful if those modified rules continued to apply after expiration of Award 282. The Court of Appeals undoubtedly held in its prior decision that respondents' work rules as modified by the Award do continue to apply after expiration of the Award until changed in accordance with the Railway Labor Act,[7] and specifically

[7] Petitioner seeks to distinguish (Pet., at 18-19) between the Award

applied that principle to uphold activities of the kind now complained of. Petitioner does not contend that the Court of Appeals misinterpreted its prior opinion, and plainly could not reasonably so contend. The decision below merely upholds for the second time the right of respondents to continue to apply their work rules as modified by Award 282, and does not authorize any action which would violate those work rules unless and until changed in accordance with the Railway Labor Act.

We see no need to discuss in detail at this time the reasons why the court below was correct in holding that respondents' work rules as modified by Award 282 continue to apply until changed in accordance with the Railway Labor Act. We note, however, that the Congress in P.L. 88-108 integrated the arbitration there provided into the "time tested provisions of the Railway Labor Act." S. Rept. No. 459, 88th Cong., 1st Sess., at 3. Section 4 of P.L. 88-108 provided that, to the extent possible, "the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, [and] the board's award shall be made and filed as

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itself and interpretations by Board 282 of its Award. But Section 4 of P.L. 88-108 directed Board 282 to conduct its arbitration pursuant to Sections 7 and 8 of the Railway Labor Act which provide, among other things, that disputes over the meaning or application of an arbitration award shall be submitted to the board that rendered the award, and that the rulings of the board thereon shall be filed with "the original award and become a part thereof," 45 U.S.C., § 157 Third (e), and "shall have the same force and effect as such original award," 45 U.S.C. § 158(m). See *e.g., Brotherhood of Rail. Train.* v. *Terminal R. Ass'n of St. Louis*, 127 U.S. App. D.C. 37, 380 F. 2d 584 (1967), *cert. den.*, 389 U.S. 940 (1967); *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 121 U.S. App. D.C. 230, 349 F. 2d 207 (1965); *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 120 U.S. App. D.C. 295, 345 F. 2d 985 (1965). Thus, the "Award" which modified the prior work rules included not only Award 282 as originally issued but also the interpretive rulings by Board 282 which by statute became a part of the Board's award. We think it obvious from their face that the statements quoted in footnotes 6 and 7 to the petition (p. 19) are not to the contrary and do not hold "that the Board's rulings were explicitly restricted to the life of the Award."

provided in said sections and shall be subject to section 9 of said Act." Under the Railway Labor Act, existing "rates of pay, rules, or working conditions" may be changed only by agreement or by giving 30-days' notice of proposed changes (45 U.S.C. § 156) and exhausting the procedures specified by the Act with respect thereto. *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 377-379 (1969). Consequently, the rules established by an agreement or arbitration award continue to apply after the termination of that agreement or award until changed in the manner provided by the Act. *Manning* v. *American Airlines, Inc.*, 329 F.2d 32, 34 (2d Cir., 1964), *cert. den.*, 379 U.S. 817 (1964). The prior decision by the court below simply applied this established principle to the rules established by Award 282. See 385 F.2d, at 593.

Petitioner's principal contention appears to be that some firemen have been forced to transfer to assignments that are less desirable in terms of earnings, location, etc. than their prior assignments, and that such "hardships" were not intended by the Congress in enacting P.L. 88-108. That argument fundamentally attacks the validity of Award 282 itself, since the activities complained of were authorized by respondents' rules as modified by that Award. Award 282 was made subject to Section 9 of the Railway Labor Act (P.L. 88-108, § 4), which requires that attacks upon the validity of an arbitration award be made within 10 days after the award is filed (45 U.S.C. § 159 Second). Moreover, the validity of Award 282 was upheld in a prior action brought by petitioner and others (see p. 4, *supra*), which decision is *res judicata* with respect to any contentions going to the validity of the Award. *Brotherhood of Rail. Trainmen* v. *Chicago, M., St.P. & P. R. Co.*, 127 U.S. App. D.C. 58, 380 F.2d 605, 608 (1967), *cert. den.*, 389 U.S. 928 (1967); *Brotherhood of Rail. Train.* v. *Chicago, M., St.P. & P. R. Co.*

(L.E.), 127 U.S. App. D.C. 289, 383 F.2d 216 (1967), *cert. den.*, 389 U.S. 933 (1967).

In any event, the Congress did not intend that the more senior firemen be protected against all "hardships." The excerpt from the speech by President Kennedy (Pet., at 15-16, 26) merely expressed his understanding that reports of two boards which had investigated the manning dispute [8] advocated the principle that each existing employee having a significant attachment to the industry should "retain the right to his present employment or to comparable railroad employment at comparable pay," and thus would not be "thrown out in the street" and would suffer "little, if any loss." Award 282 was responsive to that view, providing that certain existing firemen who accepted offers of comparable jobs were to receive five-year guarantees of their annual earnings, and that those firemen entitled to remain in engine service were to continue to receive engine-service employment (JA 15-18). Such employment has never entitled the firemen to continue in a particular assignment or guaranteed them against being disadvantaged by transfers to other assignments (see pp. 2-3, *supra*), and President Kennedy recognized that they might incur some "loss."

We note that, as stated in H. Rept. 713, 88th Cong., 1st Sess., at 3, the "reported legislation differs considerably from the recommendations of the President," as the "committee feels that developments since the President submitted his proposal have made the approach of the reported bill preferable, since the parties are closer together now than they were at the time his recommendations were made." The "reported bill," which was enacted as P.L. 88-108, provided in Section 3 that Board 282 should give "due consideration to those matters on which the parties were in

[8] Respondents accepted the recommendations of those boards, but they were rejected by petitioner, which is the only reason why the boards did not succeed in settling the dispute.

tentative agreement." And, the Neutral Members of Board 282 pointed out (emphasis added) that: "There has never been any dispute in these proceedings over the status of firemen with ten or more years of seniority. *Our award reflects the agreement between the parties that all firemen in that category* who are not 'irregulars' or on furlough *shall retain all existing employment rights, except as modified by the provisions of the award relating to reduction of jobs,* and that, in any event, they shall not be terminated except for cause or by natural attrition." *Opinion of Neutral Members,* 41 Lab. Arb. 680, 693 (1963).

In short, as the Neutral Members carefully pointed out, while the more senior firemen retained their existing employment rights, they did so subject to the right of the carriers under the work rules established by the Award to reduce the number of jobs made available for the exercise of such employment rights. Indeed, as the Neutrals noted, that principle had been agreed to by petitioner as well as by respondents. In embodying that principle in the Award, therefore, Board 282 simply followed the statutory direction that it give "due consideration to those matters on which the parties were in tentative agreement." Nothing in P.L. 88-108, on the other hand, purported to require Board 282 to protect existing firemen against all "hardships."

As we have pointed out, the "hardships" of which petitioner complains have long been characteristic of firemen's employment and result primarily from the operation of the seniority system established by agreement with petitioner.[9]

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[9] The Report of the National Joint Board noted (pp. 43-44) that: "Characteristics of engine service assignments which affect earnings include hours on duty, number of trips or tours of duty per week, speeds of trains, constructive allowances and arbitrary payments, time paid for but not worked, and a wide variety of operating conditions," and that "earnings are further dependent upon the time [the individual firemen] elect to lay off for personal or other reasons—a right which may be freely exercised if other employees are available to protect the service." In

See pp. 2-3, *supra*. This matter is put into broader perspective by the January 5, 1966 Report of the National Joint Board established pursuant to Award 282 with directions (JA 18) to make "an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen. . . ." The Joint Board concluded, among other things, that (Report, at 34):

> "The available data dealing with the earnings and earnings opportunities of firemen and the incidence of hardship among such employees affected by the Award indicates that
>
> 1. The earnings and earnings opportunities of firemen have improved or increased since the effective date of the Award
>
> 2. Cases of actual hardship among employees affected by the Award are rare
>
> 3. Such loss of earnings or hardship as may have resulted from the application of the Award, with rare exception, occurred during the first several months that the Award was effective
>
> 4. Such loss of earnings or hardship could usually have been avoided by the employee, resulting in most cases from the employee's own choice of alternatives available to him under the provisions of the Award."

These conclusions were based in part upon a 1965 survey by petitioner of 29,916 firemen in which only 188 reported that their earnings had declined during the 12-month period immediately following the effective date of the Award as compared with the 12-month period immediately prior to the effective date of the Award (Report, at 35, 42-43).

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addition, the Report noted that "[v]ariations in the earnings levels of individual firemen are characteristic of the service and unavoidable" (p. 48) and that "[w]ork away from home is one of the characteristics of train and engine service employment" (p. 51).

There is no reason to believe that this overall picture as it existed during the period of the Award, as found by the National Joint Board, is drastically different today. Indeed, as the Joint Board found, the situation during the period of the Award improved after the initial dislocations in the first few months as conditions became more settled. The carriers have continued to apply their work rules as modified by the Award, as the courts below held could be done, and the practices complained of in the petition are no different from the practices that took place prior to expiration of Award 282.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

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